



March 15, 2002

Ms. Zandra L. Narvaez  
Legal Services Division  
City Public Service of San Antonio  
P.O. Box 1771  
San Antonio, Texas 78296-1771

OR2002-1273

Dear Ms. Narvaez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159913.

The City Public Service of the City of San Antonio ("CPS") received a request for a copy of CPS' contract with M/A/R/C Research ("MARC") and the amount of money (total dollar figure) paid to MARC, to date, under this contract. You state that CPS has provided the requestor with the amount of money paid to MARC, to date, under the contract. You claim, however, that a portion of the remaining requested information is excepted from disclosure under sections 552.101, 552.104, and 552.133 of the Government Code. You state that you notified MARC of this request for information and of its right to submit reasons to this office as to why this information should be withheld from disclosure pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). In turn, MARC has submitted a letter to this office arguing that a portion of the requested information is excepted from disclosure under section 552.110 of the Government Code. We have considered all arguments and reviewed the submitted information.

You claim that a portion of the requested contract is excepted from disclosure under section 552.133 of the Government Code. Section 552.133 excepts from disclosure

information held by a public power utility that is related to a competitive matter. *See* Gov't Code § 552.133(b). A "competitive matter" is defined as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. Gov't Code § 552.133(a)(3). Section 552.133(a)(3) lists thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. Gov't Code § 552.133(c). Furthermore, section 552.133(b) provides:

Information or records are excepted from [required public disclosure] if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. *Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter*, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b) (emphasis added).

You state that CPS is a public power utility for purposes of section 552.133 and that the CPS Board of Trustees is a public power utility governing body under section 552.133(a). You explain that, pursuant to section 552.133, the CPS board has determined by resolution that certain information regarding retail activities constitutes a competitive matter which, if disclosed, would provide an advantage to existing or prospective competitors. You represent to this office that the information at issue "relates to" retail activities, including market research." We note that information regarding retail activities is not clearly among the thirteen categories of information that are expressly excluded from the definition of competitive matter and we have no evidence that CPS failed to act in good faith in adopting this resolution. *See* Gov't Code § 552.133(a)(3), (c). We agree that the information at issue reasonably relates to a competitive matter in accordance with CPS's resolution and is, therefore, excepted from disclosure under section 552.133 of the Government Code. Consequently, CPS may withhold the highlighted information in Exhibit A under section 552.133. In light of this conclusion, we need not address your section 552.104 claim.

MARC argues that its proposal, the "Customer Value Study," is excepted from public disclosure pursuant to section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.<sup>1</sup> Section 252.049 provides:

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
- (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049(a), (b). However, this provision is merely duplicative of the protection offered to proprietary information under section 552.110 of the Government Code. Therefore we will address MARC's arguments with respect to section 252.049 of the Local Government Code under its claims regarding section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates

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<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>2</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). We find, however, that MARC has failed to establish a *prima facie* case for exception of the information at issue as trade secrets. We conclude that MARC's proposal may not be withheld under section 552.110(a) of the Government Code.

MARC further claims that its proposal constitutes commercial information the release of which would cause substantial competitive harm to MARC. Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). After reviewing MARC's arguments and the information at issue, we conclude that MARC has established the applicability of section 552.110(b) to most of the information in its proposal. Accordingly, CPS must withhold the information that we have marked pursuant to section 552.110(b).

We note, however, that although MARC argues that portions of its proposal containing pricing information must be withheld under section 552.110(b), we do not believe that such information is generally excepted from disclosure under section 552.110(b) after a contract

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

has been let. *See* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *see also* Gov't Code § 552.022(a)(3) (information in an account, voucher, or contract relating to the receipt or expenditure of public funds by a governmental body is public information); Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Furthermore, we find that MARC has not established how the staff biographies contained in pages 12-19 of the proposal and the description of staff and project experience (pages 5 - 6) come within the purview of section 552.110(b). *See also* Open Records Decision No. 319 at 3 (1982) (stating that statutory predecessor to section 552.110 ordinarily does not protect information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Consequently, pricing information, experience, and staff biographies contained in the proposal may not be withheld from disclosure under section 552.110(b).

In summary, CPS may withhold the highlighted information in Exhibit A from disclosure under section 552.133 of the Government Code. The information which we have marked in Exhibit A must be withheld from public disclosure under section 552.110(b) of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID#159913

Enc. Submitted documents

c: Mr. Roddy Stinson  
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(w/o enclosures)